Nos. 93-356, 93-521

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS, INC.,
Petitioner,
v.
AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,
v.
AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICI CURIAE* WILTEL, INC., *ET AL.*, IN SUPPORT OF PETITIONERS

PETER A. ROHRBACH
DAVID G. LEITCH *
KARIS A. HASTINGS
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5822
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THE FCC'S PERMISSIVE DETARIFFING POLICY IS WELL WITHIN THE AUTHORITY DELEGATED TO THE COMMISSION IN SECTION 203	7
A. Congress Has Directly Spoken to the Question at Issue by Providing the Commission with Authority to Modify Any Requirement of Section 203, Including the Tariffing Requirement	10
B. At a Minimum, the FCC's Construction of the Statute it Administers is Reasonable and Entitled to Deference from the Courts	18
II. THE FCC'S DECISION DID NOT IMPLICATE THE FILED RATE DOCTRINE, WHICH DOES NOT SPEAK TO THE QUESTION OF WHEN RATES MUST BE FILED	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page
American Telephone & Telegraph Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993)	7, 15, 28
Ardestani v. INS, 112 S. Ct. 515 (1991)	12
Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985)	12, 18
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	5, 7, 8, 10, 18-19
Crandon v. United States, 494 U.S. 152 (1990)	19
Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992)	10, 12, 18
FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940)	9
Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151 (1993)	19
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	10
K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)	10
Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993)	13
Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992)	15
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	28-29
MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985)	7, 15-17
National Railroad Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394 (1992)	12, 14-15
National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453 (1974)	13
Negonsott v. Samuels, 113 S. Ct. 1119 (1993)	10
NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987)	18
Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524 (1991)	8, 18
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	28
Perrin v. United States, 444 U.S. 37 (1979)	12

TABLE OF AUTHORITIES—Continued

	Page
Russello v. United States, 464 U.S. 16 (1983)	12
Sullivan v. Everhart, 494 U.S. 83 (1990)	10
United States v. James, 478 U.S. 597 (1986)	12
United States v. Shimer, 367 U.S. 374 (1961)	18
United States v. United States Gypsum Co., 438 U.S. 422 (1978)	21
Young v. Community Nutrition Institute, 476 U.S. 974 (1986)	11
Administrative Rulings:	
Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991)	25
Expanded Interconnection with Local Telephone Company Facilities:	
Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259 (1991)	25
Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992)	26
Second Notice of Proposed Rulemaking, 7 FCC Rcd 7740 (1992)	26
Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993)	26
Policy & Rules Concerning Competitive Common Carrier Services and Facilities Authorizations Therefor ("Competitive Carrier Rulemaking"):	
Fifth Report and Order, 98 F.C.C.2d 1191 (1984)	3, 20
First Report and Order, 85 F.C.C.2d 1 (1980)	3
Fourth Report and Order, 95 F.C.C.2d 554 (1983)	3, 4, 20, 21
Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 (1981)	21, 24
Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979)	3, 19, 20, 21
Second Report and Order, 91 F.C.C.2d 59 (1982)	3, 20, 21

TABLE OF AUTHORITIES—Continued

Page

Sixth Report and Order, 99 F.C.C.2d 1020, *vacated, MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) 15, 17

Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, 7 FCC Rcd 804 (1992) 23

Tariff Filing Requirements for Nondominant Common Carriers:

Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993) 21, 24, 27

Notice of Proposed Rulemaking, 8 FCC Rcd 1395 (1993) 23, 26

Statutes:

47 U.S.C. § 151 ..... 5, 6, 19-22

47 U.S.C. § 201(b) 3, 24

47 U.S.C. § 202(a) 3, 24

47 U.S.C. § 203 ..... *passim*

47 U.S.C. § 203(a) 11, 13, 14, 16

47 U.S.C. § 203(b)(2) ..... *passim*

47 U.S.C. § 203(c) 13-14

47 U.S.C. § 226(h)(1)(A) 14-15

Legislative Materials:

FCC and NTIA Authorizations: Hearings Before the Subcom. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989) 14

H.R. Rep. No. 213, 101st Cong., 1st Sess. (1989) 14

S. Rep. No. 439, 101st Cong., 2d Sess. (1990) 14

Other Authorities:

Black's Law Dictionary (5th ed. 1979) 11

FCC Industry Analysis Division, *Long Distance Market Shares, Third Quarter, 1993* (December 1993) 22

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992) 9, 10

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511 (1989) 8-9

TABLE OF AUTHORITIES—Continued

	Page
Jahan Sharifi, *Precedents Construing Statutes Administered by Federal Agencies After the* Chevron *Decision: What Gives?*, 60 U. Chi. L. Rev. 223 (1993)	15
Laurence H. Silberman, Chevron—*The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821 (1990)	8, 18
Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071 (1990)	9, 12
Telecommunications Reports (Sept. 13, 1993)	24
Webster's Ninth New Collegiate Dictionary (1989)	11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-356

MCI TELECOMMUNICATIONS, INC.,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

No. 93-521

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICI CURIAE* WILTEL, INC., *ET AL.*, IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici WilTel, Inc., LDDS Communications, Inc. d/b/a LDDS Metromedia Communications, Cable & Wireless, Inc., Chadwick Telecommunications Corp., American Network Exchange, Inc., KLP, Inc. d/b/a Call America, U.S. Long Distance, Inc., Consolidated Network, Inc., Capital Network System, Inc., Impact Telecommunications Corp., LCI International, Inc., One-2-One Communications, Inc., and Telephone Electronics Corp. are long

distance telephone companies of varying size. All of these companies are considered non-dominant interexchange carriers by the Federal Communications Commission, and accordingly were not required to file and maintain tariffs with the Commission prior to the decision below. *Amicus* America's Carriers Telecommunications Association is a trade association representing non-dominant long distance carriers. *Amicus* MFS Communications Company is a competitive local exchange carrier in the emerging market for alternatives to the local telephone company monopolies, and also was not required to file tariffs prior to the decision below.

Under the court of appeals decision, *amici* would be required to file tariffs with the Federal Communications Commission. This requirement would not only result in added financial burdens on *amici*, but would also be detrimental to the viability and further development of telecommunications competition. *Amici* therefore have a direct stake in the outcome of this case, which is of far-reaching significance to the entire telecommunications industry. This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from a decision of the Court of Appeals for the District of Columbia Circuit invalidating the longstanding permissive detariffing policy of the Federal Communications Commission ("FCC" or "Commission"). The court of appeals found that this policy, which the FCC has characterized as "one of the cornerstones" of its regulation of developing telecommunications competition (Pet. App. 65a),[1] violated Section 203 of the Communi-

[1] Citations to "Pet. App." are to the Appendix to the Petition for Writ of Certiorari in No. 93-356. Unless otherwise indicated, citations to FCC orders and notices are citations to such items in CC Docket No. 79-252, *Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor* (*"Competitive Carrier Rulemaking"*).

cations Act of 1934, as amended ("the Communications Act" or "the Act"), 47 U.S.C. § 203.

More specifically, this case has developed out of the FCC's *Competitive Carrier Rulemaking*, a multi-staged proceeding between 1979 and 1985 that established regulatory policies to govern new competitors entering heretofore monopoly telecommunications markets. Over 13 years ago the FCC concluded that the rates of such "non-dominant" carriers are presumptively lawful because they "simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene" applicable sections of the Communications Act. *See First Report and Order*, 85 F.C.C.2d 1, 31 (1980).[2] No party sought review of that decision, or the reduced tariff regulation that the FCC adopted to implement it. Two years later the FCC reaffirmed its conclusion regarding the presumptive lawfulness of non-dominant carrier rates based on its expert review of subsequent events in the market. The Commission then found that tariff regulation of such carriers was unnecessary and granted permissive detariffing to resale carriers. *See Second Report and Order*, 91 F.C.C.2d at 64-71. The next year the FCC extended permissive detariffing to other non-dominant car-

[2] In its 1979 *Notice of Inquiry and Proposed Rulemaking*, the Commission announced its "tentative belief that competitive carrier rates are highly unlikely to contravene the Act." 77 F.C.C.2d 308, 310. The Commission reasoned that under widely accepted economic theory "the rates of non-dominant carriers are unlikely to be either predatory or supra-competitive and thus are unlikely to contravene" the proscription of 47 U.S.C. § 201(b) on unjust and unreasonable rates. *Id.* at 334. Likewise, "these same factors preclude these [non-dominant] carriers from unjustly discriminating in favor of some customers at the expense of their other customers," *id.* at 337, in violation of the Act's prohibition on "unjust or unreasonable discrimination in rates." 47 U.S.C. § 202(a). The Commission has repeatedly endorsed these conclusions. *See, e.g., First Report and Order*, 85 F.C.C.2d at 5, 20; *Second Report and Order*, 91 F.C.C.2d 59, 69 (1982); *Fourth Report and Order*, 95 F.C.C.2d 554, 577-578 (1983); *Fifth Report and Order*, 98 F.C.C.2d 1191, 1199-1202, 1207-08 (1984).

riers. *See Fourth Report and Order*, 95 F.C.C.2d at 578.[3] No party sought review of any of these Commission decisions.

Thus, for well over a decade it has been a black letter principle that non-dominant carrier rates, terms and other service conditions are presumptively lawful. This principle is not before the Court today; indeed, it has never been challenged.

The only issue here is whether the FCC's authority to modify any requirement of Section 203 of the Act is sufficient to allow the Commission to excuse hundreds of non-dominant carriers from filing tariffs that the Commission has already held are presumptively lawful. The D.C. Circuit answered that question in the negative, and the question is now before this Court on review.

SUMMARY OF ARGUMENT

This case goes directly to the heart of the FCC's ability to regulate developing telecommunications competition at a time of great ferment in the industry. The court of appeals has stripped the FCC of a crucial tool—clearly entrusted to the Commission by the Communications Act —by which it fosters competition.

The court of appeals read the plain meaning of Section 203(b)(2) too narrowly when it found that the express grant of authority to "modify any requirement" of Section 203 did not give the FCC the flexibility to adopt permissive detariffing. This plain meaning is supported both by the specific language of Section 203, the language and structure of other parts of the Act, and subsequent congressional action. Because the Commission's understanding of the statute it administers is demonstrably correct, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously ex-

---

[3] At that time the FCC noted that over the preceding three years it had received only five petitions challenging tariff filings of "specialized" (*i.e.*, new) common carriers such as MCI, and that none of the petitions had merit. See 95 F.C.C.2d at 578 n.79.

pressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Should the Court find Section 203 ambiguous or unclear on the question presented, it is plain at a minimum that the Commission's construction of this provision is a permissible one. The D.C. Circuit below failed to defer to the FCC's reasonable interpretation of its governing statute as required by *Chevron*. Had it done so, it would have found that the language of the Communications Act amply supports the FCC's decision to excuse non-dominant carriers from filing tariffs.

Permissive detariffing is supported, not only by Section 203, but by the FCC's expert and reasonable understanding of the broader purposes of the Act—and the complex industry conditions in which it applies. Section 1 of the Act gives the FCC a broad mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. § 151.

The FCC determined nearly two decades ago that competition can help meet these objectives. The *amici* here owe their existence to that decision. But the challenge of a transition from monopoly to competitive markets cannot be overstated. Even today AT&T's long distance market share is over 60%, three times greater than that of even its largest rival. Equally important, competition with local telephone companies is only now beginning. The FCC had just taken its first major steps to encourage such competition when the D.C. Circuit invalidated the permissive detariffing policy.

The court of appeals struck down one of the most important tools used by the FCC to manage competitive market development. The flexibility provided by Section 203 of the Act allows the FCC to avoid harmful and unnecessary tariff regulation of developing competitors—

regulation that the Commission has found could prevent competition from taking root in the face of the market power of preexisting monopolies. The Commission then has used this same flexibility gradually to reduce regulation of the dominant monopoly as market competition grows.

Significantly, the Commission long ago found that the rates charged by non-dominant competitors are presumptively lawful under the Act because those carriers lack market power. Indeed, the Commission made tariff filing permissive only after it reaffirmed, based on further experience, that non-dominant carrier rates should continue to be considered presumptively lawful. No party has ever challenged this substantive conclusion.

The only issue here, then, is whether Section 203 should be given a constricted reading so as to require the filing of rates that the Commission has already found presumptively lawful, even though such a requirement would have harmful effects on users of telecommunications services and on the overall policy goals expressed in Section 1 of the Act. In these circumstances the Court should respect the language of Section 203, and restore to the Commission its full statutory authority to regulate competitive market development.

ARGUMENT

I. THE FCC'S PERMISSIVE DETARIFFING POLICY IS WELL WITHIN THE AUTHORITY DELEGATED TO THE COMMISSION IN SECTION 203

In holding that the Commission's authority to "modify any requirement" of Section 203 does not permit it to modify the tariff filing requirement, the court below rejected the agency's interpretation of the statute it administers. Remarkably, it did so without analyzing the agency's construction under the principles announced by this Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the seminal decision establishing the guidelines for analysis "[w]hen a court reviews an agency's construction of the statute which it administers * * *." *Id.* at 842.[4] Under that familiar analysis, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If, however, "the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute * * *. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

---

[4] The D.C. Circuit's unpublished *per curiam* opinion below did not cite *Chevron* and relied exclusively on its opinion in *American Telephone & Telegraph Co.* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993). That opinion, in turn, mentions *Chevron* only to say that the court's 1985 decision in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985)—which the D.C. Circuit found (incorrectly, we think) to be the ultimate source for the decision below—did not cite *Chevron*. Thus, although all of the tariffing decisions of the D.C. Circuit postdate this Court's decision in *Chevron*, that court has never analyzed Section 203 under *Chevron* principles.

The D.C. Circuit's failure to apply the teaching of *Chevron* was fundamental error. One of the primary effects of the approach mandated by this Court in *Chevron* is to ensure the appropriate distribution of authority in our federal system. As the Court observed in *Chevron* itself:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. [467 U.S. at 865-866.]

See also Pauley v. *Bethenergy Mines, Inc.* 111 S. Ct. 2524, 2534 (1991) (judicial deference mandated by *Chevron* "reflects a sensitivity to the proper roles of the judicial and political branches").[5] *Chevron*'s allocation of the appropriate roles between the judiciary and the executive is not, however, merely a matter of political theory, for it also reflects the relative competence and expertise of the two branches. For this reason, the Court has found particular significance in the complexity of the statute at issue, and the expertise of the agency in administering it. *See, e.g., id.* (in the context of a "complex and highly technical regulatory program" requiring the application of "significant expertise" and "the exercise of judgment grounded in policy concerns, * * * courts appropriately defer to the agency entrusted by Congress to make such policy determinations").[6]

---

[5] *See also* Laurence H. Silberman, Chevron—*The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 822 (1990) (*Chevron* "is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary").

[6] Justice Scalia has explained that "one of [*Chevron*'s] major advantages from the standpoint of governmental theory * * * is to permit needed flexibility, and appropriate political participation, in the administrative process." Antonin Scalia, *Judicial Deference*

Long before the decision in *Chevron*, this Court recognized the need for particular deference to the Commission's judgments under the Communications Act. The Act, the Court observed, is a "supple instrument for the exercise of discretion by an expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). By its decision below, therefore, the D.C. Circuit imposed its understanding of the statute not only in the face of the contrary requirements of *Chevron*, but also against the longstanding recognition of the Commission's authority to exercise the discretion granted by the "supple instrument" handed to it by Congress sixty years ago to develop regulatory policies that promote the national interest in efficient, reasonably priced telecommunications.

Vindication of these longstanding principles is particularly important now, when the FCC is in the midst of supervising the complex transition from monopoly to competitive telecommunications markets. The FCC's exercise of its flexibility thus far has been a success, as demonstrated by the existence of the *amici* here and the important role they play in bringing innovative services to the public.

The court below disregarded the authority given the FCC by the plain meaning of the statute to excuse nondominant carriers from filing tariffs. Moreover, the court did not acknowledge, let alone apply, its obligation to

---

to Administrative Interpretations of Law, 1989 Duke L. J. 511, 517 (1989). *See also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969, 1002 (1992) ("the practice of deferring to executive interpretations of statutes performs many valuable functions: it allows policy to be made by actors who are politically accountable; it draws upon the specialized knowledge of the administrators; it injects an element of flexibility into statutory interpretation; and it helps assure nationally uniform constructions"); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2084 (1990) ("when agency competence is relevant, deference is particularly appropriate").

defer to the FCC's reasonable interpretation of the Act. As a result, the court's decision must be reversed.

A. Congress Has Directly Spoken to the Question at Issue by Providing the Commission with Authority to Modify Any Requirement of Section 203, Including the Tariffing Requirement

Amici fully concur in the submission of the Solicitor General that "the FCC's policy is not merely a reasonable interpretation of the statute, it is the correct one." 93-521 Pet. at 14. As this Court's post-*Chevron* decisions have explained, the inquiry under step one of the analysis is an effort to "ascertain[] the plain meaning of the statute, * * * look[ing] to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988).[7] These traditional tools of statutory construction establish that the FCC correctly determined that its permissive detariffing decisions were authorized by the Communications Act.

a. As the Court has repeatedly noted, all statutory construction must begin with the text of the statute itself. *See, e.g., Negonsott* v. *Samuels*, 113 S. Ct. 1119, 1122-23 (1993); *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The "particular statutory language at issue" in this case, *K Mart Corp.*, 486 U.S. at 291, is quite broad. Section 203(b)(2) gives the Commission power "in its discretion and for good cause shown," to *"modify any requirement made by or under the authority of this section* either in particular instances or by general order applicable to special circumstances or

---

[7] *See Sullivan* v. *Everhart*, 494 U.S. 83, 89 (1990); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (using "ordinary canons of statutory construction" to ascertain meaning of the statute); *Chevron*, 467 U.S. at 843 n.9 (inquiry into meaning of statute is to be conducted "employing traditional tools of statutory construction"). *See also* Merrill, 101 Yale L. J. at 990-992 (describing evolution of *Chevron* step one analysis).

conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." 47 U.S.C. § 203(b)(2) (emphasis added). The "requirements" of Section 203, of course, include the tariff filing requirement of Section 203(a).[8] The D.C. Circuit, however, found that the Commission, in excusing some carriers from the tariffing requirement while continuing to apply it to dominant carriers, did not "modify" that requirement. This decision was plainly in error.

The D.C. Circuit's decision rested on the definition of "modify" found in *Black's Law Dictionary* (5th ed. 1979). Pet. App. 53a. That dictionary defines "modify" as "[t]o alter; to change in incidental or subordinate features; enlarge; extend; amend; limit; reduce." *Black's* at 905. In determining that the authority to "modify" permitted only "*circumscribed* alterations," Pet. App. 53a (emphasis added), the court below apparently emphasized the portion of the definition concerning changes in "incidental or subordinate features." Even this source, however, does not so limit the meaning of the word. Thus, for example, *Black's* also defines "modify" as "amend," "limit," or "reduce." None of these definitions is qualified with any

---

[8] The D.C. Circuit apparently believed that its decisions were supported by the observation that Congress, in using the word "shall" in section 203(a), employed the language of command. *See* Pet. App. 52a. We have no quarrel with this observation. *But see Young* v. *Community Nutrition Institute*, 476 U.S. 974 (1986) ("shall" may in some circumstances be permissive). But use of the term "shall" merely establishes that Congress in fact imposed a "requirement"—which it then expressly gave the Commission the authority to "modify." *See Webster's Ninth New Collegiate Dictionary* 1002 (1989) (definition of "require" includes "to impose a compulsion or command on").

Indeed, the only "requirement" of Section 203 that is not expressly conditioned on the Commission's discretion to adopt regulations (*e.g.*, "as the Commission may by regulation require") is the basic tariffing requirement of Section 203(a). Thus, unless it applies to that requirement, the Commission's modification authority under Section 203(b)(2) would be wholly superfluous.

reference to "incidental or subordinate features." Nor does the ordinary, plain meaning of the term "modify" include any such limitation.[9] *Webster's Ninth New Collegiate Dictionary*, for example, defines "modify" as *either* "to make minor changes in" *or* "to make basic or fundamental changes in order to give a new orientation to or to serve a new end." *Id.* at 763. And this Court has observed elsewhere that "the word 'modify' * * * in its broadest sense * * * encompass[es] *any* change or alteration * * *." *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) (emphasis added).[10]

It is also evident from the "precise language at issue" that Congress, rather than limiting the Commission's authority to modifications a court might find "incidental" or "subordinate," intended the broader definition of "modify" to apply here. Congress directly and expressly gave the Commission the authority to modify "*any*" requirement of Section 203. There is no basis in this language, or in the accepted meaning of the word "modify," to hold that only "circumscribed alterations" are permissible.

Under the precise language of the statute, then, it is plain that the permissive detariffing policy does not exceed statutory authority. By permitting non-dominant carriers

---

[9] Congress is presumed to intend the ordinary meaning of the words it uses. *Russello* v. *United States*, 464 U.S. 16, 21 (1983); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

[10] This Court has suggested that "[t]he existence of alternative dictionary definitions * * *, each making some sense under the statute, itself indicates that the statute is open to interpretation." *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992). The mere existence of alternative dictionary definitions does not compel analysis under *Chevron*'s second step in this context. As we explain, other features of the Communications Act demonstrate that only one of the alternative dictionary definitions—the broad one—makes "some sense under the statute." This Court has found a statute to be unambiguous even where alternative dictionary definitions exist. *See, e.g., Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992); *Ardestani* v. *INS*, 112 S. Ct. 515 (1991); *United States* v. *James*, 478 U.S. 597 (1986). *See also* Sunstein, 90 Colum. L. Rev. at 2091 & n.97.

to forego filing tariffs, the Commission simply relied on its authority to "modify"—to change, alter, or amend—"any" requirement of Section 203, including the tariff filing requirement of Section 203(a).

2. In addition to the precise language at issue, the language and structure of the Act as a whole confirm the Commission's understanding of the statute. We believe—as the Commission did—that the statute contains three specific indications of congressional intent, each confirming the authority of the Commission to adopt permissive detariffing.

First, Section 203(b)(2) contains one—and only one—express limitation of the authority to "modify any requirement": "the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." The existence of an express limitation on the authority to modify strongly confirms that the Congress meant what it said when it otherwise gave the Commission authority to "modify *any* requirement" of Section 203. *See Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1163 (1993); *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). In its Brief in Opposition, AT&T offered no contrary explantion for this express qualification on the FCC's modification authority.

Second, the section of the Act immediately following the express grant of authority to modify clearly contemplates that some carriers will be excused from the tariff filing requirement. Section 203(c), which was ignored by the court below, provides that "[n]o carrier, *unless otherwise provided by or under the authority of this chapter*, shall engage or participate in [interstate and foreign wire or radio] communication unless schedules have been filed and published in accordance with the provisions of this subchapter and with the regulations made thereunder" (emphasis added). The plain meaning of this provision

is that it may be "provided"—here, by the Commission—"under the authority of this chapter" that some carriers may engage in such communications *without* filing and publishing schedules of charges.[11]

Third, Congress recently adopted another provision of the Act, 47 U.S.C. § 226(h)(1)(A), confirming that it shares the FCC's interpretation of Section 203. That provision, adopted as part of the Telephone Operator Consumer Services Improvement Act of 1990, imposed on non-dominant carriers offering operator services the duty to file informational tariffs. Because the information required by such tariffs would be largely contained in any tariffs filed under Section 203(a), this additional requirement of the 1990 statute would have been redundant if these non-dominant carriers were required to file tariffs under the Act. But Congress plainly did not intend to adopt a redundant regulatory requirement. Rather, fully aware of the Commission's permissive detariffing policy,[12] Congress determined that a limited form of tariffing should be reimposed on providers of certain services. Whether considered as congressional acquiescence,[13] or simply as

---

[11] AT&T has complained that this argument ignores the second clause of Section 203(c), which, it says (without bothering to quote the clause), "prohibits charging rates other than those filed in tariffs." Opp. at 16. But the second clause of Section 203(c) prohibits a carrier from charging a different rate for communications "between the points named *in any such schedule* than the charges specified *in the schedule then in effect*" (emphasis added). This restatement of the filed rate doctrine, discussed *infra* at 28 to 29, applies by its own terms only to those circumstances where a schedule has been filed and is in effect. Rather than "prohibiting rates other than those filed in tariffs," the statute clearly prohibits only rates other than those specified in any tariff that is actually filed (either by Commission mandate or voluntarily).

[12] *See FCC and NTIA Authorizations: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce,* 101st Cong., 1st Sess. 30 (1989); S. Rep. No. 439, 101st Cong., 2d Sess. 3-4 & n.10 (1990); H.R. Rep. No. 213, 101st Cong., 1st Sess. 3, 5-6 (1989).

[13] *See National Railroad Passenger Corp.* v. *Boston & Maine Corp.,* 112 S. Ct. at 1402 (finding agency's interpretation permissi-

additional statutory evidence of the scope of Section 203(b)(2), the requirement of Section 226(h)(1)(A) confirms the Commission's interpretation of the statute it administers.

3. In reaching its contrary conclusion, the D.C. Circuit below relied for its statutory construction exclusively on its earlier decision in *AT&T* v. *FCC*, *supra*, which in turn relied on its 1985 decision in *MCI* v. *FCC*, *supra*. *See* Pet. App. 2a, 52a-53a. Although the *AT&T* court found that the argument from the express authority of Section 203(b)(2) was "not insubstantial when made initially," *id.* at 52a, it rejected the Commission's view on the basis of its earlier decision in *MCI*. The *AT&T* court, however, did not recognize that the *MCI* decision was reached without the benefit of the subsequent congressional action discussed above, which demonstrated Congress's agreement with the FCC's interpretation of Section 203 as allowing "permissive detariffing." More importantly, the *AT&T* court overstated the relevance of the *MCI* decision here; the reasoning of that decision plainly does not compel affirmance of the D.C. Circuit's erroneous decisions on permissive detariffing.[14]

The *MCI* case arose out of the Commission's *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), in which

---

ble where "statutory addition enacted by the Congress," which did not modify the specific language at issue, "confirms the [agency's] view" and contrary interpretation "would make the amendment superfluous").

[14] AT&T has suggested that the decision below was based on the doctrine that "judicial construction of a statute binds subsequent courts and eliminates 'any issue of deference to the [agency].'" Opp. at 19 (quoting *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847 (1992)). But even if the D.C. Circuit's decision was mandated by its earlier *AT&T* decision, that decision certainly was not mandated by the *MCI* decision, which expressly reserved the question at issue here. None of these decisions, of course, binds *this* Court. *See generally* Jahan Sharifi, *Precedents Construing Statutes Administered by Federal Agencies After the* Chevron *Decision: What Gives?*, 60 U. Chi. L. Rev. 223 (1993).

it *prohibited* carriers from filing tariffs. The issue, therefore, was "whether the Commission has statutory authority to *prohibit* common carriers from filing tariffs * * *." Opp. App. 3a (reproducing *MCI* decision) (emphasis in original). The court held that the Commission, by prohibiting the filing of the tariffs, had not adopted the "circumscribed alterations" permitted by Section 203(b)(2) but rather had adopted a "*wholesale* abandonment or elimination of a requirement.' *Id.* at 11a (emphasis added). The court viewed the mandatory detariffing policy before it as "*fundamentally*" different from the permissive detariffing policy at issue here. *Id.* at 8a (emphasis added). It specifically noted that "we do not reach the question whether the FCC's earlier permissive orders are invalid." *Id.* at 20a.

The D.C. Circuit's subsequent *AT&T* decision relied on the *MCI* opinion—which, as noted, expressly reserved the issue presented in *AT&T* and here—with little analysis. Rather, the court simply repeated the language of *MCI* and concluded: "Whether detariffing is made mandatory, as in the *Sixth Report,* or simply permissive, as in the *Fourth Report,* carriers are, in either event, relieved of the obligations to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to 'modify' requirements of the Act." Pet. App. 53a. This *ipse dixit,* however, provides no support for the Court's extension of the *MCI* holding on mandatory detariffing to the "fundamentally" different permissive detariffing policy at issue here.

The *MCI* decision stands only for the proposition that the authority provided in Section 203(b)(2) does not permit the "wholesale abandonment or elimination" of Section 203(a) such that carriers are prohibited from filing tariffs. The court thereby protected the *opportunity* to file tariffs that also is present in Section 203. Some carriers had noted affirmative reasons why they might wish to retain tariffs, including simplification of contracting with customers and coordination with corresponding

tariffs for intrastate services. *See Sixth Report and Order*, 99 F.C.C.2d at 1024-25 & n.13. They argued that Section 203 allowed them to maintain interstate tariffs on file with the FCC, even if the FCC itself had no material interest in the tariffs for its own purposes, and was willing to make such filings voluntary.

But unlike the mandatory detariffing at issue in *MCI*, permissive detariffing does not constitute "wholesale abandonment or elimination" of the requirements of Section 203. Rather, the Commission, "in its discretion and for good cause shown," Section 203(b)(2), modified the requirement by making the mandatory element of that section applicable only for tariffs that are not presumptively lawful—*i.e.*, tariffs of carriers with market power. The FCC also retained regulation of other carriers through its complaint process and investigative powers.

It is one thing to hold that the Commission may not modify a statutory command by turning it into a prohibition—the action the D.C. Circuit condemned in *MCI*—thereby affecting carriers' opportunity to file tariffs if they wish. But it is quite something else to say that the Commission may not modify the command by excusing some carriers from compliance where the Commission itself has no further need for the relevant tariff filings to meet its statutory duties. In the language of the D.C. Circuit, the former is more plainly a "wholesale elimination or abandonment," while the latter bears the characteristics of an alteration that is "circumscribed," *i.e.*, limited in its application. Thus, even if the *MCI* case accurately describes the boundaries of the statutory authority (an issue this Court need not reach), that case does not compel the decision reached by the D.C. Circuit in the "fundamentally" different context presented here.

B. At a Minimum, the FCC's Construction of the Statute it Administers is Reasonable and Entitled to Deference from the Courts

Although this case may be resolved on the basis of the plain evidence of the statute's meaning, the foregoing demonstrates, at a minimum, that the agency's construction of the statute is a permissible one entitled to deference under *Chevron*. As the *Chevron* Court explained, an agency's interpretation of an ambiguous statute is entitled to deference so long as it " 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.' " 467 U.S. at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)). Once a court determines that the issue is not definitively resolved by the statute, "it is incumbent upon [the party challenging the agency's interpretation] to establish that the agency's construction is inconsistent with the structure and purpose of the statute and therefore impermissible." Silberman, 58 Geo. Wash. L. Rev. at 827. AT&T cannot carry that burden here.

When analyzing an agency construction of a statute under step two of the *Chevron* test, this Court has deferred to any reasonable or rational agency construction.[15] As the Court observed just last Term:

> [W]here the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the agency's

---

[15] *See, e.g., Estate of Cowart*, 112 S. Ct. at 2594 (deference is owed to a "reasonable" statutory interpretation from an administering agency); *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. at 2535 (agency position "entitled to deference" so long as it is reasonable); *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) (question is whether agency's construction is "rational and consistent with the statute"); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. at 125 (agency's construction sustained if it is a "sufficiently rational one").

> current view, which, as we see it, so closely fits "the design of the statute as a whole and * * * its object and policy." [*Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993) (quoting *Crandon* v. *United States*, 494 U.S. 152, 158 (1990)).]

We have already demonstrated that the agency's construction fits closely with the language and design of the statute. We explain below that this construction—which even the D.C. Circuit called "not insubstantial," Pet. App. 52a—also is a reasonable implementation of the object and policy that guide the statute.

1. Section 1 of the Communications Act, 47 U.S.C. § 151, imposes on the FCC the mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." This directive was given "at a time when there was little or no competition in telecommunications." *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d at 359. However, as new technological and legal developments permitted the introduction of competition into certain market segments, the FCC recognized its obligation under Section 1 to foster such competition to improve telecommunications efficiency and choice for consumers, as well as to reduce prices. As discussed above, in the *Competitive Carrier Rulemaking* the FCC adopted regulatory policies applicable to new entrants, including a finding that the rates and service terms of competitors are presumptively lawful. Again, this conclusion has never been challenged, and will remain a governing principle however the Court decides this case. *See supra* at 3-4.

It follows that when the FCC construed Section 203, it reasonably concluded that the modification authority provided there was broad enough to permit it to excuse nondominant carriers from filing tariffs that the Commission did not require in order to meet its statutory obligations. Permissive detariffing was a small and logical step.

The Court should recognize that even though the FCC has created a presumption that non-dominant carrier rates are lawful (and excused tariff filing on that basis as unnecessary), the Commission at all times has retained full authority to examine such rates upon customer complaint or its own motion. *See, e.g., Second Report and Order,* 91 F.C.C.2d at 70; *Fourth Report and Order,* 95 F.C.C.2d at 556. Non-dominant carriers must stand ready to file relevant rate information upon request, and have that information evaluated under the statutory standards. Thus, in no respect did the Commission abandon its fundamental responsibility to protect consumers from unlawful rates when it exercised its modification discretion under Section 203(b)(2).

The FCC's construction of Section 203 is even more clearly reasonable given the affirmative harm the Commission found that mandatory tariff filing would do to its general obligations under Section 1. As early as 1979, in the first notice in the *Competitive Carrier Rulemaking,* the FCC expressed concern that "some of the potential public benefits which we had hoped would flow from freer entry have been frustrated, in part, by continued adherence to rules and procedures governing tariff filings * * * designed primarily for carriers with dominant market positions and monopoly services." *Notice of Inquiry and Proposed Rulemaking,* 77 F.C.C.2d at 330. *See also id.* at 309. For example, the FCC found that tariff requirements imposed significant impediments to market entry, for the direct costs of preparing, filing, and maintaining a current tariff are substantial. *Id.* at 359.

These costs take on heightened significance in the context of firms with little or no market power trying to break in against a longstanding industry giant. From the time of its initial notice in 1979, the Commission has repeatedly found that tariff filings in the context of an otherwise competitive market would likely have *anticompetitive* effects. As the FCC explained, carriers attempting to compete "must either offer services unavailable

from the established carriers or, more likely, offer services with rates, conditions and practices more favorable than those offered by the established carriers." *Id.* at 324. The FCC saw that dominant monopoly carriers could use the tariff process to squelch such competitive market developments. *Id.* The Commission further found that continued regulation of non-dominant firms would "discourage the introduction of new, competitive services," act as a barrier to market entry by new firms, and inhibit innovative pricing mechanisms. *Id.*

The FCC has endorsed these conclusions repeatedly in its decade of experience with the deregulation of non-dominant interexchange carriers.[16] For example, the FCC emphasized in the rulemaking directly at issue here its finding that "mandatory tariff regulation of non-dominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends." Pet. App. 27a.[17]

---

[16] *See, e.g., Fourth Report and Order*, 95 F.C.C.2d at 555 n.1 (tariff filing requirements "impede entry, impair competitive pricing, and facilitate collusive conduct") (citing *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 457 (1978) ("the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements")); *Second Report and Order*, 91 F.C.C.2d at 71 (tariff "requirements stifle price competition and service and marketing innovation"); *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 454 ("Tariff posting * * * provides an excellent mechanism for inducing noncompetitive pricing").

[17] The FCC has endorsed the fundamental conclusions supporting its regulatory decisions even after the D.C. Circuit issued the decision below. In response to the *AT&T* decision, the Commission "reaffirm[ed]" its "policy findings, adopted nearly a decade ago in *Competitive Carrier*, and conclude[d] that * * * traditional tariff regulation of nondominant carriers is not only unnecessary to insure just and reasonable rates, but is actually counterproductive * * *." *Tariff Filing Requirements for Nondominant Carriers, Memorandum Opinion and Order*, 8 FCC Rcd. 6752, 6752 (1993) (footnote omitted) (*"Rate Range Order"*), *appeal pending sub nom.*

2. The Commision's judgment that the permissive detariffing modification serves the goals of the Communications Act has been confirmed by its actual effect on the marketplace for long distance services. As the Commission noted below, "permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange [long distance] market and the increased choices for consumers with respect to carriers and prices." *Id.* at 29a. Such choices advance Section 1's mandate of "adequate facilities at reasonable charges."

Amici are a product of the Commission's actions. Consumer options have increased dramatically under permissive detariffing: "In 1982, approximately a dozen long distance carriers operated within the United States. By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers." *Id.* at 30a. AT&T's share of the market, while still large enough to secure its place as the dominant carrier, "declined from over 80% to just more than 60%, while its rates for directly dialed interstate [service] have also fallen substantially." *Id.*[18]

Given the costs and negative effects resulting from tariff filings by non-dominant carriers, the FCC's decision to free those carriers from the obligation to make such filings plainly was a substantial factor in this market maturation. Indeed, the Competitive Telecommunications Association told the FCC that many of the companies

---

Southwestern Bell Corporation v. *FCC*, Nos. 93-1562 *et al.* (D.C. Cir. filed Aug. 30, 1993). Nevertheless, the FCC was constrained to impose some type of tariff regulation on nondominant carriers because the court below had held that filed tariffs are required by the Act.

[18] The FCC has reported that "[b]y mid 1993, about 72% of the nation's [telephone] lines were presubscribed to AT&T, 15% to MCI and 6% to Sprint," with "[o]ver four hundred smaller carriers" accounting for the remainder of the interstate long distance industry. FCC Industry Analysis Division, *Long Distance Market Shares, Third Quarter, 1993* at 3 (December 1993).

operating in the market "would not be in existence today were it not for the Commission's policy of encouraging competition in the telecommunications marketplace through the lifting of unnecessary and burdensome regulations." Reply Comments of the Competitive Telecommunications Association at 11.[19]

Perhaps the most compelling confirmation that permissive detariffing fosters the Act's general purpose is the unanimity of the *users* of long distance telecommunications services in support of the policy. For example, the Ad Hoc Telecommunications Users Committee (the ongoing representative of major corporate telecommunications departments on regulatory issues), called the Commission's policy "a major regulatory success story" as a result of which "[c]ompetition has burgeoned in the long-distance marketplace." Comments at 3. Likewise, the International Communications Association, which describes itself as "the largest association of telecommunications users in the world," observed that the permissive detariffing policy permits non-dominant common carriers "to make rapid, efficient responses to changes in demand and cost * * * and price competitively," all without any detriment to users. Comments at 5.

In short, the FCC's detariffing policy has served the goals of the Communications Act well, just as the Commission hoped when it announced that policy over a decade ago. Adopted at a time of almost no competition

---

[19] Citations to comments are to those comments received by the FCC in response to *Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking*, 7 FCC Rcd 804 (1992), the proceeding that led to the decision at issue here.

See also Comments of OCOM Corporation at 8 ("Many of the smaller carriers today would not be here now or be able to continue offering competitive services under a more burdensome regulatory structure." Permissive detariffing is "critical to the survival of a substantial number of nondominant interexchange carriers"); Reply Comments of the United States Commerce Department's National Telecommunications and Information Administration at 5.

in the market for long distance services, the policy has enabled hundreds of new firms to enter and begin to compete effectively by offering innovative service and rate plans. Prices for long distance service have decreased dramatically. There is no evidence of widespread violations of the substantive pricing prohibitions in Sections 201(b) and 202(a) of the Act. Nothing has led any party to ask the FCC to reconsider its finding that non-dominant carrier rates are presumptively lawful.

These substantial marketplace benefits, however, could easily be lost, and further development of competition stunted, if the decision below stands. A mandatory tariff requirement on non-dominant carriers necessarily curbs those carriers' ability to offer innovative price and service plans to meet customer needs as they arise. *See Further Notice of Proposed Rulemaking,* 84 F.C.C.2d at 454. This is true even though the FCC has attempted to minimize the tariff burden on non-dominant carriers as it responds to the court of appeals decision here. The Commission has permitted non-dominant carriers to file so-called rate range tariffs setting forth minimum and maximum rates and offering prices within the bands. *See Rate Range Order, supra.* Even these tariffs impose unnecessary burdens on carriers, and in any event AT&T and certain local telephone companies have challenged the Commission's *Rate Range Order* based on the same court of appeals decision at issue here. *See Telecommunications Reports,* Sept. 13, 1993, at 22. In a long distance market where one firm still controls more than 60 percent of the business, any reduction in the pressure of competition is likely to be damaging to that market's further development.[20]

---

[20] It should be emphasized that as the long distance marketplace has become more competitive, the FCC also has substantially relaxed its regulation of AT&T to permit AT&T to respond to that competition. Today virtually all AT&T tariffs also are considered presumptively lawful. AT&T has broad freedom to negotiate prices

3. The statutory purposes served by the permissive detariffing modification are not limited to the long distance arena. The FCC has concluded that this policy is equally required for the development of other markets where telecommunications competition is far less advanced.

Local telephone service is a prime example. This multi-billion dollar market is now the domain of the Bell Operating Companies and other local exchange telephone companies ("LECs"). But like the long distance market in the early 1980s, the local telephone market is the focus of increasing competition.[21]

The Association for Local Telecommunications Services ("ALTS") explained in comments before the FCC that its member non-dominant competitive access provides ("CAPs") "attempt to compete directly with dominant local exchange carriers" by "deploy[ing] innovative technologies—including fiber optic and microwave networks" —in metropolitan areas across the country. ALTS Com-

---

with customers on a competitive basis, and then file simple tariffs reflecting the rates and other major elements of the resulting contracts. *See Competition in the Interstate Interexchange Marketplace, Report and Order*, 6 FCC Rcd 5880, 5882, 5894, 5897 (1991). Given AT&T's continued domination of the long distance market, the FCC has not been willing to excuse AT&T altogether from filing tariffs—the FCC still sees the need to oversee AT&T's conduct to that extent. However, AT&T has recently filed a request for the FCC to extend permissive detariffing to it as well; that request is now under consideration by the Commission. Motion for Reclassification of AT&T as a Nondominant Carrier, filed by AT&T in the *Competitive Carrier Rulemaking* (Sept. 22, 1993).

[21] As the Commission has explained: "For many years, local exchange carriers (LECs) faced little or no competition in providing the local access facilities and services used in the provision of interstate communications. Recent changes, however, have facilitated the development of competition in the provision of these facilities and services." *Expanded Interconnection with Local Telephone Company Facilities ("Expanded Interconnection"), Notice of Proposed Rulemaking and Notice of Inquiry*, 6 FCC Rcd 3259, 3259 (1991).

ments at 1-2. Thus, for example, *amicus* Metropolitan Fiber Systems "operates state-of-the-art digital fiber optic telecommunications networks in the business districts" of cities throughout the United States. Comments of Metropolitan Fiber Systems at 2. *See also* Comments of Local Area Telecommunications, Inc. at 1 (company provides "a broad range of * * * competitive access services, primarily via microwave facilities"). Nevertheless, the CAP share of the total market for local telephone exchange services remains less than one percent. ALTS Comments at 5-6.

The Commission has recently adopted new local exchange policies to begin what it calls "the process of opening the remaining preserves of monopoly telecommunications service to competition." *See, e.g., Expanded Interconnection, Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369, 7372 (1992). In that context, the Commission noted the success of its deregulatory approach toward long distance services. *Id.* at 7378. The FCC similarly believed that greater competition in the local telephone market should increase "incentives for efficiency and encourage deployment of advanced technologies facilitating new and innovative services." *Expanded Interconnection, Second Report and Order and Third Notice of Proposed Rulemaking*, 8 FCC Rcd 7374, 7383-84 (1993). The Commission has taken several actions to foster competition in the local telephone market, and further proposals are pending.[22]

The FCC's steps to promote new local service competition have taken place against a background of permissive detariffing for non-dominant CAPs,[23] supported by the

---

[22] *See, e.g., Expanded Interconnection, Second Notice of Proposed Rulemaking*, 7 FCC Rcd 7740, 7747-49 (1992).

[23] *See, e.g., Tariff Filing Requirements for Nondominant Common Carriers, Notice of Proposed Rulemaking*, 8 FCC Rcd 1395, 1397 (1993) ("Since their inception, CAPs have not been burdened by interstate tariff filing requirements").

same FCC statutory construction and policy conclusions arrived at in the *Competitive Carrier Rulemaking* described earlier. Under the decisions below, however, the Commission has been required to reimpose tariff regulation on the CAPs along with all other non-dominant carriers.[24] Such regulation substantially and unnecessarily interferes with the still-emerging competition in the local market, no less than it would have interfered with new long distance competition a decade ago. CAPs face substantial hurdles to market entry, including the need for massive capital investment and vigorous price competition from the reigning monopolists. As ALTS explained below, "[i]mposition of a mandatory tariffing obligation would impose a substantial economic burden on such carriers. The costs associated with the preparation and maintenance of federal tariffs—legal and consulting fees, the diversion of personnel, the filing fees—constitute an expense the CAPs can ill afford." ALTS Comments at 6-7. More important, mandatory tariffing can provide an opportunity for the dominant LECs to bring price and service rigidity to the marketplace, thereby discouraging innovations CAPs might offer in service or price and stifling the newborn competitors.

Local telephone competition holds the promise to revolutionize the nation's telecommunications infrastructure. The FCC envisions a future in which multiple carriers—local and long distance, mobile and wireline—interconnect with one another and compete to offer business and residential users advanced quality services at lower prices. To reach that goal—the goal mandated by Section 1 of the Communications Act—the FCC will need all the flexibility provided by the Act. In these circumstances, the FCC's construction of Section 203 is entirely reasonable and demands deference from the judicial branch.

---

[24] *See Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order*, 8 FCC Rcd 6752, 6754 (1993).

II. THE FCC'S DECISION DID NOT IMPLICATE THE FILED RATE DOCTRINE, WHICH DOES NOT SPEAK TO THE QUESTION OF WHEN RATES MUST BE FILED

This is not a filed rate doctrine case. Indeed, under the FCC's decision hundreds of non-dominant carriers filed no tariffs, and hence had no "filed rate". *Amici* make this observation only because AT&T has placed tremendous weight on the filed rate doctrine here, and particularly on the Court's application of that doctrine in the context of a different regulatory statute in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). In its opposition to the petitions for certiorari, for example, AT&T repeatedly asserted that the D.C. Circuit's decision below was 'required * * * by a long line of this Court's decisions culminating in *Maislin*." Opp. at 1. *See also id.* at 5 (the decision in *Maislin* "elimnated any possibility that the FCC, might have the authority that MCI claimed"); 7, 9-14, 19-20.[25] But the decision

---

[25] The D.C. Circuit in *AT&T*, by contrast, observed in a footnote only that its decision was "somewhat buttressed" by *Maislin* and cited the "shared lineage" of the Communications Act and the Interstate Commerce Act. Pet. App. 53a-54a n.12. This genealogical approach to statutory interpretation, however, cannot substitute for a precise examination of the language at issue, which both the D.C. Circuit below and AT&T in this Court have declined to offer. As the petitioners demonstrated in their replies to the opposition to the petitions, the language of the Communications Act is different in vital respects from that of its ancestor the Interstate Commerce Act. *Amici* agree with petitioners that *Maislin*, which discusses the filed rate doctrine in the context of the Interstate Commerce Act, does not control how the doctrine would be applied under the Communications Act, and in any event that decision is irrelevant here. To the extent that reasoning by analogy to other regulatory contexts is appropriate, a more apt analogy is to this Court's decision in *Permain Basin Area Rate Cases*, 390 U.S. 747 (1968), in which the Court endorsed the Federal Power Commission's regulatory decisions that "began a new era in the regulation of natural gas producers." *Id.* at 755.

below was in no way compelled (as AT&T contends) by the filed rate doctrine.

Properly understood, AT&T's extreme reliance on *Maislin* is a red herring. The filed rate doctrine involves the relative enforceability of inconsistent contract and tariff terms; it provides that in such a case a bona fide tariff provision governs. The specific question in *Maislin* was "the validity of [an ICC] policy * * * that relieves a shipper of the obligation of paying *the filed rate* when the shipper and carrier have privately negotiated a lower rate." 497 U.S. at 119 (emphasis added). The resolution of that question, the Court found, rested on a straightforward application of the filed rate doctrine: the filed tariff rate applied.

This case, by contrast, involves the entirely different question of whether a tariff rate is required in the first place. The filed rate doctrine has nothing to say about this question. None of the filed rate doctrine cases AT&T cites involves an interpretation of the scope of the tariff filing requirement. The question at issue in this case is not answered by citation of the doctrine; it is instead answered by the specific language of the Communications Act. *See Maislin*, 497 U.S. at 136 (Scalia, J., concurring) ("prior 'filed-rate' decisions * * * were based not on the 'regulatory scheme as a whole,' * * * but rather on the text of the statute"). Based on its reasonable interpretation of Section 203, the FCC properly relieved nondominant carriers of the obligation to file tariffs at all.

CONCLUSION

For the foregoing reasons, and those in the briefs of petitioners, this Court should reverse the decision below.

Respectfully submitted,

PETER A. ROHRBACH
DAVID G. LEITCH *
KARIS A. HASTINGS
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5822
Counsel for Amici Curiae

* Counsel of Record